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When “anxious scrutiny” of arms exports facilitates humanitarian disaster.

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About once a decade, an arms trade scandal punctures public consciousness and generates debate about British foreign policy, the state of domestic democracy, and accountability for political decisions. Arms to Iraq caused scandal for the Conservatives in the early 1990s and led to the Scott Report, which was pivotal in the shift towards improved transparency in the arms trade and common European arms export rules. New Labour’s foreign policy with an ‘ethical dimension’ of the late 1990s faced embarrassment due to the use of British-made weapons supplied to Indonesia in atrocities in East Timor and Aceh. Since 2015, arms sales to Saudi Arabia have generated controversy due to their role in creating humanitarian catastrophe in the war in Yemen: thousands dead and displaced, politically imposed famine through aerial and naval blockade, and now a cholera epidemic. In the intervening years since the Scott Report, UK commitments to international humanitarian law (IHL) and human rights have become legally binding, as have common EU export rules and, most recently, a UN treaty regulating the international arms trade. More frequent and informative reporting on arms export licensing and, since 2000, the Freedom of Information Act have increased the scope of transparency around UK arms exports, albeit with significant national security and commercial confidentiality restrictions.

In February 2017, activists took the government to court in a case of judicial review. Campaign Against Arms Trade (CAAT) argued that the UK government is breaking its own laws governing arms exports by continuing to sell weapons to Saudi Arabia since the start of the war in Yemen. Using evidence from Médecins Sans Frontières, the UN Panel of Experts on Yemen, and NGOs such as Human Rights Watch and Amnesty International, amongst others, CAAT’s lawyers argued that the government has broken its legal obligation not to allow exports if there is a clear risk that weapons might be used in serious violations of international humanitarian law. The judges, Lord Justice Bennett and Mr Justice Haddon-Cave, concluded in July, largely on the basis of secret information heard in closed sessions, that the government was “rationally entitled to conclude” that the Saudi-led coalition was not deliberately targeting civilians; that Saudi Arabia respects and is committed to complying with IHL; investigates controversies; and engages in dialogue with the UK.¹ Indeed, the judges emphasised “the anxious scrutiny – indeed at what times seems like anguished scrutiny at some stages – given to the matter and the essential rationality and rigour of the process.” Not only has the High Court found in favour of the government; it has given the added stamp of legitimisation, which has quickly been claimed by the UK government in what has become a contentious public issue. BAE Systems, the main UK arms

company supplying weapons to Saudi Arabia, has been silent throughout the process, shielded by government policy – and its share price rose by 2pc on the High Court judgment being released.

How is it that an explicit government commitment to humanitarian law has failed to prevent arms exports to a warzone widely condemned for unnecessary and illegal civilian harm; improvements in transparency after previous scandals have been undermined by the reliance on secret information; and a legal challenge to government policy has ended up providing a stamp of approval to an arms export policy that has contributed to the deaths of thousands of civilians in Yemen? In what follows I offer a commentary on the judicial review judgment in an attempt to start answering this question. I discuss the ramifications of three key issues that emerged from the hearing: the threshold of “clear risk” in assessing arms exports; the reliance on secret information in making and scrutinising policy; and the deference of the High Court to the executive and to UK-Saudi relations. Detailed attention to the judgment allows observers to document the political and legal manoeuvring that goes into managing the contradictions in government policy and understand how the gap between stated policy and actual practice is mediated..

Arming Saudi Arabia

The UK has been one of the largest arms suppliers to Saudi Arabia since the 1960s, alongside the USA. The British arms industry, in particular aerospace, has become reliant on the relationship with Saudi Arabia: the *Al Yamamah* contracts of the 1980s and their successor, the *Al Salam* Project, are a government-to-government arrangement in which BAE Systems, formerly British Aerospace, fulfils the UK government’s obligations. Wall-to-wall secrecy and allegations of corruption have persisted over the years, and have shaped British politics repeatedly, from the suppression of the 1992 Comptroller and Auditor General’s report into allegations of corruption in the *Al Yamamah* deals, to the calling off of the 2005 Serious Fraud Office inquiry into allegations of corruption, at the behest of the Saudi government. This time round, the controversy has centred on violations of the laws of war in Yemen: the bombing of civilian buildings, including hospitals, markets and shelters; the designation of entire towns as military targets; and the destruction of infrastructure, causing famine and a cholera epidemic. The judges in the judicial review hearing did not dispute the veracity of the evidence provided by CAAT; they acknowledged that CAAT’s evidence was suggestive of serious IHL violations. However, they concluded that the government has more and better information, and that the open source evidence provided by CAAT is “only part of the picture.” Secret information completed the picture, to the point where the judges felt able to conclude that the government is legally entitled to conclude that there is no clear risk that weapons supplied to Saudi Arabia might be used in serious violations of the laws of war. The judicial review hearing took place in a politicised environment

– there has been an unusual level of media, NGO and parliamentary scrutiny of arms exports to Saudi Arabia compared to other destinations. And the case hit the headlines of *Newsnight* in September 2016, when the parliamentary Committees on Arms Export Controls, who were conducting an inquiry into the use of UK-supplied weapons in Yemen, were unable to agree on a recommendation to the government, and the draft report was leaked to the flagship news programme amidst allegations of intra-committee bullying and threats. Two competing parliamentary reports on the inquiry were published, both fairly critical of key aspects of government policy, but differing on the key question of whether to recommend a suspension of exports to Saudi Arabia.

The controversy over arms exports to Saudi Arabia takes place twenty years on from the Scott Report into arms exports to Iraq, which concluded that ministers had “practised to deceive”. As with Scott, the political stakes are high: “these policy waters [the Middle East, and the UK’s commercial fortunes] were among the deepest of all in British foreign and military strategic relations ... In these deep and dark waters, Government secrecy is dominant and the contrary values of open government and public accountability most remote.”² The Scott Report was both a direct impetus to some of the improvements in UK export policy, and a signal of the deeply entrenched interests and values that have proved harder to shift. Common multilateral rules under the EU Code of Conduct on Arms Exports (now legally binding in the form of an EU Common Position), and incremental improvements in transparency through the global reporting instrument of the UN Register of Conventional Arms, can be directly traced to the fallout from Scott. Since then, the Export Control Act of 2002 updated UK legal commitments for the first time since 1939, and in 2014 the UK ratified the UN Arms Trade Treaty. Yet controversies persist despite the formal legal commitments; and secrecy takes different forms now, but still functions to dampen challenges to policy.

Government reporting on arms export licensing decisions is both more frequent and of higher quality than in the early 1990s. Since 2000 the Freedom of Information Act has allowed observers to chip away at secrecy, albeit with strong qualifications for national security and commercial concerns. Secrecy is not quite the deadening blanket it was in the past: the policy of supporting Saudi Arabia is not secret in the way that policy towards Iraq was (the officially given policy was one of neutrality between Iran and Iraq). But the managed release of information and manipulation of common-sense understandings of risk run alongside older strategies of obfuscation, partial responses, and official denial. Assessing risk, as per government arms export policy, requires interpretation, judgment and decision: how would the government know when IHL principles are being violated? What sources of information should government rely on, especially in the fog of war? And where is the threshold of risk: when is a risk clear? These are

challenging policy demands for civil servants and politicians. But equally, interpretive and rhetorical artistry are central to the practice of politics; so when does interpretation become obfuscation? Interpretations and decisions, if they are to be accepted as legitimate, must also be “made in good faith and with some consensus.”³ Such consensus is sorely lacking on the issue of arms exports to Saudi Arabia, and there are serious doubts about the good faith of the government’s position.

The threshold of “clear risk”

The UK government is vocal in its view that it operates one of the most rigorous arms export control regimes in the world. Operating a case-by-case risk assessment framework, its stated policy is that it will not allow arms exports if there is a clear risk that they might be used in serious violations of IHL. UK national security – including commercial interests – and that of friendly states may also be taken into account, but cannot affect consideration of human rights and IHL. As such, one might think that the provision of credible evidence (by organisations that the UK government itself cites when criticising other states) indicating violations of the laws of war by the Saudi-led coalition in Yemen using UK-supplied weapons would suggest a “clear risk” that weapons “might” be misused, and lead to a suspension of arms exports. For example, the bombing of a funeral in Sana’a in October 2016 killed at least 140 and injured hundreds more; the coalition designated the entire cities of Sa’ada and Marran as military targets; and at least four Médecins Sans Frontières medical facilities have been bombed, despite the organisation sharing its coordinates with the coalition and insisting that the neutrality of its facilities had not been compromised.

During the judicial review hearing, the government did not dispute that such examples cited by CAAT were likely violations of IHL. Rather, it claimed that it had additional, “sensitive” information that meant that the risk was not a “clear” risk; that any excessive civilian harm was a mistake and was being addressed by the Saudi-led coalition, thereby mitigating the risk; and that it did not need to explain why CAAT’s argument was wrong. The High Court accepted the government’s claims, and concluded that the evidence provided by CAAT was “only part of the picture” and the government was rationally entitled to conclude that there was no clear risk – and thus, that there was no need to suspend or cancel arms exports to Saudi Arabia.

The explanation of this paradoxical situation is spelled out quite clearly in an email from the head of the government’s Export Control Organisation, Edward Bell, to the Permanent Secretary of the Department of Business, Innovation and Skills (as it was then) and others in February 2016. He wrote: “There is a lot at stake here politically but if you accept that the threshold for ‘clear risk’ of a serious violation of International Humanitarian Law has not been

breached then it is permissible to take wider factors – such as diplomatic and economic relations – into account. If you do not accept this then it's not permissible to do so." This neatly encapsulates the policy and the source of the controversy at stake: the government must do everything in its power to argue that the IHL criterion has not been breached, so that it can take politico-military support for Saudi Arabia and UK economic interests in arms exports into account in making export licensing decisions. In short, the clear risk threshold cannot be seen to have been breached.

How exactly has an ostensibly preventive policy of risk been mobilised to justify rather than restrict exports – to ensure that the threshold of clear risk is not seen to have been breached? Three issues stand out. The first is knowledge: much of the judicial review hearing focused on the MOD's "Tracker" database and the question of whether the government knew, or should have known, about potential violations of IHL. CAAT claimed that part of the government's failure was that it did not adequately assess whether the Saudi-led coalition was respecting IHL in its bombing campaign, and thus failed to apply its policy correctly. The inability of the MOD to identify a legitimate military target for the majority of likely Coalition airstrikes meant that arms exports should have been suspended. However, the government argued, and the High Court accepted, that "the fact that a significant proportion of incidents listed on the Tracker did not refer to a 'legitimate military target' ... does not mean ... that there was in fact no 'legitimate military target' which was the subject of the airstrike or that none was ever identified at the time." Yet the judges said nothing in their judgment about the fact that this claim only relates to pre-planned strikes; the government concedes that it has much less oversight over what is known as "dynamic targeting," or attacks conducted in the heat of an encounter, which account for a significant proportion of all strikes. The second issue is time, and the relationship of past conduct to future risk: the judges accepted the government's position that "Past and present conduct is one indicator as to future behaviour and attitude to International Humanitarian Law, but not necessarily determinative." The growing number of allegations over time "were concerning but they did not warrant a change in the overall analysis of the risk of future non-compliance with International Humanitarian Law by the Saudi authorities." There are substantive interpretive issues around how to anticipate risk; but in a policy that has a non-negotiable commitment to the protection of IHL, and in the absence of any publicly aired evidence of a change in the pattern of Saudi targeting, this defies any reasonable interpretation of risk. And the third issue is intent: the judges concluded that "the Coalition were not deliberately targeting civilians", and that whilst mistakes happen, they were not deliberate, and the Saudi military has taken appropriate measures to rectify them. Yet attacks on civilian objects continue, and Saudi investigations into allegations have been slow, incomplete, and opaque.

Overall, the judicial review judgment ended up confirming the legality of a policy and process in which the UK government claims not to know whether violations of IHL are taking place, evidence of past misuse is not deemed to pose a clear risk that future exports might be misused, and evidence of systematic attacks on civilians are explained away as mistakes. Rather than acting to prevent harm, a risk-based framework for assessing arms transfers ends up facilitating exports. The importance of judgement and flexibility – practices intrinsic to risk assessment – makes the limits of policy negotiable rather than absolute.

Reliance on secret information

One of the ways in which the government has been able to claim that the risk of the misuse of weapons is not a clear risk is through the reliance on “sensitive” information that could not be disclosed openly in court for ostensible national security reasons. The judicial review hearing included closed sessions with Special Advocates, and the judges issued both a public and a closed judgment, having scrutinised the open source and closed materials. The sources of sensitive information include operational reporting data from the Saudi-led coalition, passed to the UK; MOD-sourced imagery; and intelligence reports and battle damage assessments. The content of the sources remains unknown to outside observers, and it remains unclear how it changes the interpretation of the evidence supplied in open session. There has been no rebuttal of the evidence supplied by CAAT, and no explanation of how the secret evidence challenges the claim that there is a “clear risk” that weapons sold to Saudi Arabia “might” be used in serious violations of IHL. There is a gap in the logic of the government’s argument and the judges’ judgment. On the one hand, the judges acknowledged that CAAT’s materials suggest that the Saudi-led coalition has violated IHL; on the other, these materials are “only part of the picture.” But there has been no explanation of how the secret information that ‘completes’ the picture changes the significance of the material already in the public domain – and the Court accepts the government’s claim that it does not have to prove why CAAT is wrong. This circular, self-reinforcing logic obscures more than it illuminates.

Of course, secrecy and reliance on privileged material are not new strategies when governments want to deflect criticism. In the arms to Iraq case, ministers “had deliberately run a changed policy and kept it secret out of fear that public outcry would force them to cancel the change if the truth leaked out.”⁴ Yet even though the government used Public Immunity Certificates to try and keep information out of the public eye, the Scott inquiry did chip away at blanket secrecy. Scott got access to intelligence reports, which were cited publicly, recorded and published, demonstrating that “intelligence material, as a category, need not be subject to secrecy.”⁵ Davina Miller and Mark Phythian concluded from the Scott inquiry that “Self-imposed secrecy results from an acceptance that only the Government can assess the consequences of

disclosure.”⁶ They were talking about Parliament, but the same can be said of the High Court. The judges accepted the government’s claim that it was best placed to assess the consequences – but the government has a vested interest in that claim, as its behaviour in relation to other Saudi-related controversies such as the calling off of the Serious Fraud Office inquiry, and the more recent suppression of the report into terrorist financing suggests.

So far, so secret. Yet the mode in which secrecy operates is changing. Since the 1980s, and in part as a direct result of arms to Iraq, there have been developments in transparency, as noted previously. Whilst information is still limited, more is publicly available. Combined with social media and the immediacy of circulation of allegations, news of civilian suffering in Yemen permeates public consciousness and has generated something of a crisis for British policy. Yet in the flurry of claim and counter-claim, there remains a black box of government decision-making: it remains entirely opaque how decisions about the threshold of risk are made. The policy to arm Iraq was secret; the policy to arm Saudi Arabia is an explicit component of foreign policy. It is the ramifications of that policy that are contested, as they fly in the face of the UK’s legal obligation to protect IHL and abide by multilateral arms trade regulations. Extensive justification and legitimisation work must be done so as to try to square the circle of civilian suffering in Yemen with the desire to support the Saudis.

In the arms to Iraq case, there was a deliberate government policy of misleading Parliament. In the Saudi case, in addition to the use of closed sessions to look at secret information, and the extensive redaction of any materials released into the public domain, there has also been a rewriting of the official record. In the last hours of the last day of Parliament in summer 2016, the Foreign Office issued a set of corrections to its statements about arms exports to Saudi Arabia, changing its position from one of certainty that the coalition had not breached IHL, to one of uncertainty – that “we have not assessed that there has been a breach.”⁷ Media and Parliamentary furore ensued; yet the government’s explanation that a few responses had been misdrafted was accepted by the High Court judges, who described them as “infelicities of expression which, when pointed out, were corrected.” Even without wanting to interfere with the actions of the executive, deeper scrutiny of such a position is surely warranted in order to critically assess the government’s judgment in carrying out its policy. In addition to suppression, then, there is extensive management of information. The issues from the 1980s and 1990s generated by arms trade scandals – “secrecy, the abuse of power and accountability - the fundamentals of democratic society”⁸ – remain, but are being mediated in slightly different ways.

Deference of the High Court to the Executive

The reliance on secret information was indicative of a broader trend illustrated by the hearing – the deference of the High Court to the executive. The judges accepted the government QC’s advice that primacy should be accorded to the executive as the primary decision maker. They agreed that arms export decisions are “matters of judgment and policy” and thus “primarily matters for the executive.” The judges emphasised that they do not have the institutional expertise that the government has, and thus, “the Executive’s assessments in this area are entitled to great weight”. The judges’ role is to scrutinise, whilst being wary of interfering – they were careful not to “stray into areas” beyond their remit and expertise. The judges accepted the government’s claim that the evaluation of risk in arms export decision-making “has parallels with making national security assessments.” But the arms export guidelines are clear that national security concerns can only come into play *after* the mandatory risk assessment for IHL has been carried out, and cannot trump it. In a deftly dismissive move, the judges interpreted in the government’s favour a point that elsewhere been mobilised as criticism: namely, that the decisions about arms exports to Saudi Arabia are “finely balanced.” The Foreign Minister, Boris Johnson, received media and commentator criticism for conceding to a House of Lords Select Committee that the UK was only “narrowly on the right side” of the risk threshold and thus the law. One might think the judicial review would provide the opportunity for the High Court to critically assess this claim; yet it was precisely the moment at which the Court stepped back and ceded ground to the executive.

While the Secretary of State has the authority to make decisions about arms exports (formally, it is the Secretary of State for International Trade who is responsible for arms exports; but on the advice and in collaboration with Foreign Affairs and Defence), it is not clear that he has the expertise. That expertise is delegated to civil service officials, who are responsible for collecting and assessing evidence with regard to government policy, and passing advice up the chain of responsibility. It remains unclear what contestation, if any, there has been from within the civil service of approvals of arms exports to Saudi Arabia since the war in Yemen began. Yet licensing decisions have speeded up rather than slowed down, which seems odd given the increasing scale of information about potential violations of IHL, and suggests that political direction has been issued. Those in senior positions have also been careful to protect themselves: documents released to the court during the judicial review show the head of the Export Control Organisation told the Permanent Secretary and others – including, he suggests, the Secretary of State – that “my gut tells me we should suspend;” and show the Foreign, Defence and Business (now Trade) Secretaries being careful to rope each other in. Business Secretary Sajid Javid wrote to Philip Hammond (Foreign Secretary at the time) and Defence Secretary Michael Fallon that “I

would like your agreement that this is the right policy". Their successors Liam Fox and Boris Johnson have done the same.

A key part of the deference to the executive was the uncritical affirmation of government expertise, and delegitimation of that of CAAT and their legal team. There are repeated references in the judgement to how sophisticated the government's processes and knowledge are, and how sophisticated and complex the demands of IHL analysis are. The implicit denigration of campaigners' empirical, thematic and legal expertise was accompanied by the explicit, and factually incorrect, sidelining of their evidence on the grounds that NGOs "often have not visited and conducted investigations in Yemen, and are necessarily reliant on second-hand information." Most of the NGOs and investigators cited in the hearing actually do visit Yemen and other warzones, conduct fieldwork, and take great care to triangulate their sources – precisely because they are aware of the stakes of making mistakes, and the propensity for the politicisation of allegations. Misrepresentations such as this must be particularly galling for NGOs and researchers whose work on other issues is mobilised by the government when it seeks to criticise others.

In addition, there is considerable deference to the UK-Saudi relationship. The entire hearing, and wider UK justifications for arms exports, are premised on UK knowledge of Saudi practices due to the "longstanding friendly relationship" between the two states. Whilst clarifying that the IHL assessment is a legal test that does not allow political considerations, the judges simultaneously demonstrated that the context of friendship with another state is crucial: "The process is imbued with assessments of how a friendly foreign government will act." And Saudi Arabia is not just any old friend; in this case, the processes are "more personalised than the norm". Therefore, statements that have widely been subjected to critical scrutiny by NGOs and the media – around the rigour of Saudi-led investigations into allegations of IHL violations, for example – were taken at face value by the High Court judges, who "can see no reason to consider it impermissible for the Secretary of State to conclude that such statements were more than aspirational." This is in the context of the Serious Fraud Office inquiry being called off, and the government refusing to publish the anti-terrorism financing report, to cite just two examples of UK deference to Saudi demands. There are plenty of reasons to be sceptical about the sincerity and justificatory function of such statements about the rigour of Saudi efforts to comply with IHL.

Conclusion

To return to the original question: how has an explicit commitment to humanitarian law failed to protect humanitarian values, and a legal challenge ended up providing a stamp of approval to an arms export policy that has contributed to the deaths of thousands of civilians in Yemen to date? An important part of the answer is to be found in the practices illustrated by the

judicial review hearing: a flexible interpretation of risk that facilitates rather than restricts arms exports; a reliance on secret information; and deference of the court to the executive and to state definitions of the national interest. In self-limiting their role, under the rubric of attempting to scrutinise but not interfere, the judges took at face value claims that should have been opened up for scrutiny. The legal emphasis on rationality of process dominated over debate about the substance of policy goals. The response from CAAT has been to appeal the judgment; it remains to be seen how higher courts will treat their claim, if it is permitted. And it remains to be seen which parliamentary committees will take up the baton of scrutinising government arms export policy, and how. A legal strategy is appealing to activists for the opportunity it provides to expose government processes and demonstrate the disjuncture between stated goals and policy implementation. Yet it also contains inherent weaknesses: a legal challenge has to rely on process argument over definitions, rather than substance and explicit debate about policy goals. A risk-based framework, even one embedded in the law, can end up facilitating exports precisely because of the emphasis on judgment and flexibility.

The attempt to set the record straight and challenge denial and misrepresentation is an important strategy. But as Stanley Cohen argues in relation to knowledge about atrocities, trying to expose the contradictions involved in denials “misses the point ... The contradictory elements form a deep structure: their relationship to each other is ideological, rather than logical.”⁹ Many of the moves seen in the judicial review are classic repertoires of action to deflect criticism and deny responsibility for atrocities, in a form of interpretive denial – that is, not outright denial that extensive civilian harm has taken place in the war in Yemen, but that “what happened is not what you think it is.”¹⁰ That is, yes, there have been civilian deaths, but their cause and meaning is unclear, and the Saudi military is fighting Iran-backed Houthi rebels who must be stopped at all costs, and therefore there is not a clear risk that arms exports will be misused. The irony is that the judges openly stated during the hearing that “the role of the Court can properly take into account that there is an expectation, consistent with democratic values, that a person charged with making assessments of this kind should be politically responsible for them.” With this decision, accountability and political responsibility just got further away.

¹ The Queen (on the application of Campaign Against The Arms Trade) v The Secretary of State for International Trade and interveners (2017) Case No: CO/1306/2016, Approved Judgment, 10 July 2017. Where no alternative reference is given, all further quotations in this piece are from the High Court judgment.

² A. Barker, ‘Practising to Deceive: Whitehall, arms exports and the Scott inquiry,’ *The Political Quarterly*, vol. 68, no. 1, 1997, pp. 41-49.

³ S. Cohen, *States of Denial. Knowing About Atrocities and Suffering*, Polity, Cambridge, 2001, p. 106.

⁴ Barker, ‘Practising to Deceive,’ p43

⁵ D. Miller and M. Phythian, 'Secrecy, Accountability and British arms exports: Issues for the post-Scott era,' *Contemporary Security Policy*, vol. 18, no. 3, 1997, p 113

⁶ Ibid., p114

⁷ T. Ellwood, 'Corrections to Parliamentary Questions and Westminster Hall Debates: Written Statement – HCWS125, 21 July 2016

⁸ D. Miller, 'Democracy, dictators and the regulation of arms exports: The UK and Iraq,' *Intelligence and National Security*, vol. 9, issue 3, 1994, p.537

⁹ Cohen, *States of Denial*, p. 103

¹⁰ Ibid., p.7.